No. 6426

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHIN CHING,
Appellant,

vs.

JOHN D. NAGLE as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE

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A.

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the Southern Division of the Northern District of California, denying appellant's petition for a writ of habeas corpus. (Tr. 38.)

B.

FACTS OF THE CASE

The appellant is a male Chinese, age 22 years, who was denied admission into the United States by a board of special inquiry on the ground that he had not satisfactorily established that he is the son of Chin Kim, an American citizen. (Tr. 16 to 27, inclusive.) That

decision was affirmed on appeal by the Secretary of Labor. (Tr. 29 to 36, inclusive.)

C.

ARGUMENT

1. THE EXCLUDING DECISION OF THE IMMIGRATION AUTHORITIES IS NOT ARBITRARY OR CAPRICIOUS.

The single question before the court below and now before this court is "whether the evidence submitted in the application for admission so conclusively established the alleged relationship that the order of exclusion should be held arbitrary or capricious." (Jew Theu v. Nagle, (C. C. A. 9) 35 F. (2d) 858; Jue Yim Ton v. Nagle, (C. C. A. 9) No. 6291, decided April 6, 1931.)

Appellant in his brief has omitted all reference to the most vital features upon which the excluding decision of the executive officers is based, and has failed to mention the final decision of the Secretary of Labor after a rehearing granted to the applicant, which final decision appears at pp. 32 to 36 of the transcript.

The first very vital point which appellant has overlooked is the fact that Chin Kim, appellant's alleged father, is utterly discredited as a witness by contradictory testimony over a period of years.

On February 25, 1907, when returning from China, the alleged father testified as follows:

"Q. Have you any children?

A. No." (Respondent's Exhibit "D," p. 5.)

In 1921 the alleged father attempted to bring an

alleged son, Chin Pok, into the United States and at that time he testified that Chin Pok was his son by his first wife and that Chin Pok was born on October 2, 1906. He denied that he had testified on February 25, 1907, that he had no children and stated "I think there must be a mistake made in the writing because my son was born several months before I left home." (Respondent's Exhibit "C," pp. 12-11.)

On June 22, 1921, in connection with the same matter, the alleged father, after much evasion, and after being confronted with his testimony of 1907, testified as follows:

> "*This is an adopted son.* The mother of Chin Pok was Luey Shee *and not my wife.* Shortly after the birth of this boy, the mother became ill and my wife was asked to go and bring the child to our house. His mother died about a month and a half after his birth and my wife and I adopted him.
>
> * * * * * * * *
>
> Q. How do you account for the fact that on June 4th you stated that the applicant was the son of your first wife, Louie Shee?
>
> A. I thought if we had adopted him that it would be all right to say that she was his mother." (Respondent's Exhibit "C," pp. 27 and 26.)

The alleged father was then confronted with his testimony of May 13, 1920, wherein he testified that he had no adopted children, and denied that he ever made such a statement, although the records show that on May 13, 1920, when returning from a previous visit to China, he testified as follows:

> "Q. Have you ever had any adopted children?
> A. No." (Resp. Exhibit "D," p. 42.)

In view of this situation the decision of this court in the case of

Quan Wing Seung v. Nagle, 41 F. (2d) 58,

is decisive of the matter. In that case this court said:

> "In 1911 the alleged father testified that he had no children, whereas in 1925 he testified that he had a son, Quan Kim Wing, who was born in 1906, and who was then seeking admission as his son. The record is replete with alleged discrepancies, *but in view of the false testimony given by the father in an effort to secure the admission of an alleged son we cannot say that a fair hearing was denied because the Immigration authorities did not believe his testimony in the present instance.*"

Accord:

> *U. S. ex rel Fong Lung Sing v. Day,* (C. C. A. 2) 37 F. (2d) 36 at 38;
>
> *U. S. ex rel Soy Sing v. Chinese Inspector,* (C. C. A. 2) 47 F. (2d) 181 at 184.

In fact, in the case at bar, the contradictions are even more striking than in the cases cited, because the alleged father not only testified in 1907 that he had no children and in 1921 that he had a son born in 1906 by his first wife, but he also admitted in 1921 that he had testified falsely then, saying "I thought if we had adopted him that it would be all right to say that she was his mother." Furthermore, he had testified in 1920, just a year before, that he never had any adopted children.

It is also settled that where the alleged father has testified falsely, and for that reason his credibility as a witness is impaired, the testimony of the applicant

himself will not impel a favorable finding on the part of the Immigration authorities.

Nagle v. Wong Dock, (C. C. A. 9) 41 F. (2d) 476 at p. 478;
Weedin v. Ng Bin Fong, (C. C. A. 9) 24 F. (2d) 821;
U. S. ex rel Fong Lung Sing v. Day, supra;
U. S. ex rel Soy Sing v. Chinese Inspector, supra.

The testimony of the two alleged acquaintances of the applicant is without probative value on the issue of the appellant's paternity. Lee Yew claims to have seen the applicant only twice, viz., in November, 1928, and in September, 1929. (Resp. Exhibit "A," pp. 18 and 19.)

Lim Wing claims to have first met the applicant in January, 1928, in China and to have seen him five or six times since. (Resp. Exhibit "A," pp. 78 and 79.)

Speaking of similar testimony of a witness who claimed to have visited the home of an applicant on three occasions, Circuit Judge Deitrich, in his concurring opinion in

Weedin v. Lee Gock Doo, 41 F. (2d) 129 at p. 131,

said:

> "If it be granted that the corroborating witness Wong Ben Yook testified in good faith, his testimony is without substantial probative value."

Accord:

U. S. ex rel Soy Sing v. Chinese Inspector, supra.

It is therefore settled under very recent decisions of this court and other courts that upon such a record as

is here involved it cannot be said that the decision of the Immigration authorities denying the applicant admission is arbitrary or capricious, and certainly there is no error in the decision of the court below which found that no arbitrary or capricious action had been shown.

Appellant cites

> *U. S. ex rel. Leong Jun v. Day* (D. C.) 42 F. (2d) 714.

That case, however, is not only in conflict with the decisions of the Circuit Court of Appeals for that circuit which we have cited above, but was decided on the authority of

> *Ex Parte Ng Bin Fong,* (D. C.) 20 F. (2d) 1014,

which case was reversed on appeal by this court:

> *Weedin v. Ng Bin Fong,* 24 F. (2d) 821.

In the case last cited the alleged father of the appellee admitted that certain testimony he had previously given as to the manner of his entry into Canada was untrue. This court said:

> "Clearly, under such circumstances, the Immigration officers were not bound to believe his testimony."

And relative to the testimony of the appellee himself, the court said:

> "Being an interested witness, his testimony alone would not, as a matter of law, make it incumbent upon the Immigration officers to believe or admit him."

Appellant leans heavily upon the fact that the alleged father claimed in 1913, in 1920, and in 1928 that

he had a son of the name and age claimed by the appellant. However, in

Nagle v. Wong Dock, supra,

this court held that if, as a result of discrepancies, the testimony of the alleged father were rejected, "this would carry with it the cumulative effect of his declaration made to the Immigration authorities on previous occasions that he had three sons as the result of his marriage with Hom Shee whose names and ages correspond with the names and ages of the three alleged brothers."

Appellant also devotes considerable space to a statement of matters regarding which appellant and his alleged father were in agreement.

In

Nagle v. Quon Ming Him, 42 F. (2d) 450,

this court said:

> "The effect of discrepancies such as these must be determined from an examination of the entire record. Such an examination in this case shows that in all probability the appellee and his alleged prior landed brothers were related, or at least were acquainted, and the testimony of the alleged father and his two alleged sons show that they were more or less familiar with the home village and its inhabitants, but such testimony does not necessarily tend to show relationship, or to overcome the effect of the discrepancies to which we have referred."

In view of the condition of the record as set forth above, it would seem to be unnecessary to discuss the other contradictions in the testimony which was offered before the Immigration authorities in appellant's behalf, and the contradictions between that testimony and

the testimony offered in 1921 when his alleged brother, Chin Pok, was applying for admission into the United States.

Appellant in his brief has contented himself with discussing a few of the disagreements which were mentioned in the first decision of the Secretary of Labor. He has not discussed the numerous changes in the testimony of the alleged father and the applicant which are mentioned in the final finding of the Secretary of Labor after the rehearing.

The alleged father testified that the village from which the parties claim to come consists of 16 houses and a school and is surrounded on three sides by an adobe wall about 4 feet high, which has been there for 20 or 30 years (Resp. Exhibit "A," p. 13), and with this testimony the appellant agreed. (Resp. Exhibit "A," pp. 24 and 25.) However, in 1921, in connection with the application of Chin Pok, the alleged father testified as follows:

> "Q. Is there a wall at your village?
> A. No." (Resp. Exhibit "C," p. 10.)

And later, on recall in that case, as follows:

> "Q. You stated there was no wall of any kind at your village. Is that right?
> A. There is not." (Resp. Exhibit "C," p. 5.)

Similarly the alleged father and the applicant described and pictured the only well in the village as being in front of the school at the extreme west of the village and agreed that there has never been a well directly in front of the row in which their home is located. (Respondent's Exhibit "A," pp. 24 and 25,

and Exhibit "D," pp. 1 and 2.) However, in 1921 the alleged father testified that the well was a short distance in front of his row. (Respondent's Exhibit "C," p. 10.)

Again the alleged father testified on June 20, 1930, as follows:

> "Q. While you were home on your last visit, what other sons of yours were attending school in the home village?
>
> A. My 2nd and 3rd sons, CHIN SAM and CHIN GIT.
>
> Q. Did either of these boys enter school while you were home on your last visit?
>
> A. No, they all started to school before I arrived home." (Resp. Ex. "A," p. 12.)

The applicant testified as follows:

> "CHIN GIT started to school in CR 17 about the 2nd month (March, 1928) after my father had arrived home on his last trip." (Resp. Ex. "A," p. 23.)

After an excluding decision had been entered by the Board of Special Inquiry and had been affirmed on appeal by the Secretary of Labor, the case having later been ordered reopened to accept the testimony of the additional witness, LIM WING, the alleged father filed an affidavit wherein he deposed in part as follows:

> "That affiant had previously testified that his third son, Chin Git, had started to school before your affiant last returned to China in 1925, whereas the son named started to school at the age of eight years, or in the year 1927, *this mistake on the affiant's part having occurred through his momentary failure to realize the difference in ages between his second and third sons,* the former having entered school prior to affiant's arrival in China because of his greater age." (Resp. Ex. "A," p. 69.)

This is not only a case of "agreement subsequently arrived at" *(Weedin vs. Lee Gock Doo,* supra), but the affidavit is a tacit admission that the alleged father was testifying from a concocted story. Obviously the alleged father should have no need to indulge in mathematical calculation before testifying as to whether his third son had already started to school when he arrived in China on his last visit.

There are further changes of the same character. The alleged father testified on June 29, 1930, as follows:

> "Q. Did the applicant and CHIN POK ever attend school together in the home village?
> A. No." (Resp. Ex. "A," p. 15.)

The applicant testified as follows:

> "Q. Did you ever attend school with your alleged foster brother, CHIN POK?
> A. Yes, the village school.
> Q. How long did you attend school with him?
> A. About 2 or 3 years." (Resp. Ex. "A," p. 23.)

After the matter was reopened the alleged father testified on September 18, 1930, as follows:

> "My sons, CHIN PAK and CHIN JUNG (CHING), went to school together for three years." (Resp. Ex. "A," p. 76.)

Likewise the diagrams prepared by the applicant and the alleged father disagreed as to the occupants of the houses at the north end of the second and third rows in the village, their positions being reversed in the respective diagrams. (Resp. Ex. "B," pp. 1 and 2.)

In his affidavit subsequently filed, the alleged father deposed as follows:

> "In stating the occupants of the fourth houses in affiant's, and the adjoining row of houses, affiant incorrectly reversed the order of such occupants, Chin Choon being the actual occupant of the fourth house in affiant's row and Chin Sing occupying the identical house in the adjoining row." (Resp. Ex. "A," p. 70.)

There are several other contradictions and changes of the same character, which are set forth in the two summaries of the Board of Review (Resp. Ex. "A," pp. 54, 53; 99, 98.)

It is well settled in these cases that such "agreement among the witnesses subsequently arrived at may itself be considered to be a circumstance casting doubt upon the veracity of the witnesses."

Weedin v. Lee Gock Doo, (C. C. A. 9) 41 F. (2d) 129;

Moy Chee Chong v. Weedin, (C. C. A. 9) 28 F. (2d) 263;

Siu Say v. Nagle, (C. C. A. 9) 295 Fed. 676.

These numerous changes in the testimony of the parties designed to bring themselves into subsequent agreement are not touched upon in appellant's brief. However, in view of the features pointed out above, we deem it unnecessary to go into further detail.

We submit that no error has been shown in the order appealed from, and that it should be affirmed.

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